view that where the applicant would have no chance of succeeding in his application in the subsequent substantive motion if leave is granted, it is only right and proper that leave be refused to prevent a party being put to unnecessary expense in frivolous or vexatious actions or in continuing an action which was certain to fail (see *Metropolitan Bank Ltd* v *Pooley*[7] and *Riches* v *Director of Public Prosecutions*[8]). For the reason given, I therefore refused leave and I dismissed the applicant's notice of motion. The applicant appeals.

Application dismissed.

Solicitors: *Sugumar & Co.*

Reported by *Ng Sheau Jiuan*

Club Employees Union Selangor v Lake Club

HIGH COURT (KUALA LUMPUR) – CIVIL APPEAL NO R8-16-1-87
VC GEORGE J
9 SEPTEMBER 1987

Administrative Law – Industrial Court award given – Subsequent reference to High Court on certain questions of law – Test to be applied as to whether finding of Industrial Court can be reversed – Dispute on alleged dismissal of swimming instructor from club – Industrial Relations Act 1967, s 33A

The appellant is a union to which K belonged and the respondent was the club whom K worked for. The present case arose out of a dispute between the appellant and the respondent over the alleged dismissal of one K as a swimming instructor by the respondent. The Industrial Court, which heard the dispute in the first instance, held that K's work as a swimming instructor was a contract for service and it accordingly dismissed the appellant's claim that K be reinstated as a swimming instructor. The appellant invoked s 33A of the Industrial Relations Act 1967 and referred certain questions of law to the High Court. The real question in issue is whether K's contract as a swimming instructor was a contract of service or a contract for service.

Held, dismissing the appeal: (1) The question as to whether K's contract as a swimming instructor was a contract of service or a contract for service is inevitably a mixed question of law and fact.

(2) The test to be applied in reviewing the award of the Industrial Court is that stated by Lord Widgery CJ in *Global Plant* v *Secretary of State for Health and Social Security*.[1] The elements of the test are: (a) whether the decision appealed against contained any false proposition of law ex facie (b) whether the decisions reached was supported by no evidence (c) whether the facts found are such that no person, acting judicially and properly instructed as to the relevant law, could come to the decisions arrived at.

(3) Applying the test to the instant case, the chairman's award is not open to attack on any one of the above grounds.

Cases referred to

1 *Global Plant* v *Secretary of State for Health and Social Security* [1971] 3 WLR 269 (folld)
2 *Terrar* v *Minister of Pensions and National Insurance* (unreported) 3 July 1960 (folld)

Legislation referred to

Industrial Relations Act 1967 ss 20, 33A

P Kuppusamy for the appellant.
Cecil Abraham (*LK Peh* (*Miss*) with him) for the respondent.

Cur Adv Vult

VC George J: There was a reference made under s 26(2) of the Industrial Relations Act 1967 arising out of a dispute between the Club Employees Union Selangor and the Lake Club over the alleged dismissal of one Encik P Kommothy as a swimming instructor by the Club with effect from 31 January 1985. The crux of the case was whether Kommothy's work as a swimming instructor was a contract of service or a contract for service. The reference was duly heard by a chairman of the Industrial Court, Dato Wong Cheng Wee, who handed down his award on 26 May 1986.

He held that the work as a swimming instructor was a contract for service and he accordingly dismissed the Union's claim that Kommothy be reinstated as a swimming instructor.

The Union invoked s 33A of the Industrial Relations Act 1967 and sought to have a number of questions which they said were questions of law that ought to be referred to the High Court be referred to the High Court. Pursuant to the application, three of the questions were referred to the High Court as being questions of law which arose in the course of the proceedings suitable for reference to the High Court.

Encik Kommothy had initially joined the Club as a lifeguard on 1 October 1973 – ten years later, on 1 September 1983 he was promoted as a pool supervisor. Apparently, there was a collective agreement between the Union and the Club in respect of workers employed by the Club and the positions of lifeguard and pool supervisor specifically came within the categories of workers specified under the collective agreement. Swimming instructors or coaches did not.

Now, while Encik Kommothy was still a lifeguard, the pool supervisor was one Encik Sharif who apparently also functioned as a swimming instructor or coach giving lessons to members and the children of members at the swimming pool of the Club. This proved to be a lucrative side-line with the pool supervisor obtaining for it amounts greater than his salary as pool supervisor.

On or about 12 June 1980, Encik Kommothy wrote to the Club, extracts from which letter the chairman has referred to in his award thus:

> A lot of members have approached me personally for swimming lessons. There is a waiting list of 200 in the Club for swimming lessons ... If given the permission to give swimming lessons I feel this can be done after office hours when members are free ... in the morning when I am free.

The permission sought to give swimming lessons was only given to Encik Kommothy by a letter dated 12 August 1982:

> The pool supervisor, Encik Sharif, has been advised to reduce the intake of new students for swimming lessons as he has to concentrate on pool supervision and water safety.
>
> Since Encik Sharif is fully occupied, the management has decided that you being the current senior lifeguard would be the best served as an additional coach. You are hereby requested to be a part-time swimming coach with immediate effect.
>
> The Club takes a commission of 20% from the coaching fees billed to members.

Encik Kommothy did very well indeed working as the senior lifeguard and as a swimming instructor. Later he was promoted from being lifeguard to take over as the pool supervisor. He continued with the lucrative swimming lessons.

In December 1984, Encik Kommothy was asked to cease swimming lessons. Apparently, this was because the Club had decided that it ought to have a full-time coach. (The bona fides of this decision appears to have been half-heartedly questioned but this was not significantly developed at the hearing.) The job was offered to Encik Kommothy on a contract for a fixed term basis. The Union on behalf of Encik Kommothy rejected the offer and as a result the job of full-time coach was given to somebody else. Encik Kommothy was left with the job of and continued to work as the pool supervisor.

At p 3 of the award (p 21 of record), the chairman made the following finding of fact:

> When a member wished to take swimming lessons he would approach the swimming coach of his choice and obtain his consent. The member would then fill up an enrolment form in duplicate stating the name of the coach of his choice and submit it to the facilities department of the Club which would retain a copy of the form and give the other copy to the coach concerned. Lessons were then given by the coach who would fix the dates and hours for the coaching. After each lesson the member signed a chit (or the coach would just write it out on his behalf) for the cost and other particulars of the lessons. At the end of the month the coach would include the chits for all the lessons taken by the member for the month in a statement. The statement was then submitted to the facilities department. The total amount of the fees charged would be debited against the member's account with the Club. Of this gross amount the Club retained 10% and the remaining 90% was paid out to the coach by the Club by cheque.

There has been no challenge of this finding and indeed there could not have been any valid challenge to it as the finding is consistent with the evidence adduced.

It can be seen from the award that the chairman carefully considered all relevant aspects of the case of each of the parties before making, inter alia, the following findings:

> In the light of all the evidence and for the reasons given above, it is inescapable that in so far as his work as swimming coach is concerned, the claimant was not a workman; the fees he received were not remuneration from the Club and in the performance of this work the Club had no reserved right to control the manner in which he coached swimming. Part-time coaches in swimming (and in all other sports in the Club it would appear) were not an integral part of the workforce of the Club.

Consequently he ruled that the work of the claimant as part-time swimming coach or instructor which he performed between 12 August 1982 to December 1984 did not constitute part of his contract of employment with the Club or a separate contract of employment with the Club. He ruled that Kommothy's work as a swimming instructor or coach was a contract for service and not a contract of service.

The determination of this work at the initiative of the Club, therefore, the court ruled, was not a dismissal for which Kommothy could obtain relief under s 20 of the Industrial Relations Act 1967.

Section 33A(5) provides that the High Court shall hear and determine questions referred to it pursuant to s 33A as if the reference were an appeal to the High Court against the award of the court.

The questions referred to the court were as follows:

> (2) Whether or not in the light of the evidence adduced in court as a matter of law the Industrial Court was right in holding that the claimant was not a 'workman' within the meaning of that term in the Industrial Relations Act 1967.
>
> (3) Whether or not as a matter of law the Industrial Court was right in concluding that the work of the claimant as a part-time swimming coach or instructor did not constitute a part of his contract of employment with the Club or a separate contract of employment with the Club within the meaning of that term in the Industrial Relations Act 1967.
>
> (4) Whether or not the Industrial Court misdirected itself in law in holding that the payment received by the claimant through the Club for swimming lessons given by the claimant to the members of the Club was not remuneration from the Club.

They are inter-related and dove-tail to the real question in issue which is whether Kommothy's contract as a swimming instructor was a contract of service or a contract for service. This is inevitably a mixed question of law and fact. Each of the said three questions is a mixed question of law and fact.

In *Global Plant* v *Secretary of State for Health and Social Security*,[1] Lord Widgery CJ, reviewing some of the cases on the point, said:

... the question 'contract of service or no?' is inevitably a mixed question of law and fact. The question of whether it is a matter primarily of law or fact has been considered before. Indeed as far back as the days of the Workmen's Compensation Act 1906 one finds in *Simmons* v *Heath Laundry Co* [1910] 1 KB 543 that Cozens-Hardy MR, in relation to this very issue which the minister had to decide in the present case, said at p 548:

'In such a case there may be a contract for services, but there is not a contract of service. In any particular case it will be for the arbitrator, after considering all the circumstances, to decide whether the injured professional person is or is not a 'workman'. This is not a question of law, but a question of fact ...'

That is echoed in the same case by Buckley LJ who said, at p 553:

'The question in this case then resolves itself into this: Was there such evidence before the learned judge as that he upon those principles could and did find as a matter of fact that this girl in giving lessons upon the pianoforte was contracting to use her skill to achieve the result of instructing the child in playing the piano, or was she placing herself in the position of owing the duty of obeying the mother's orders as to how she should give her lessons?'

Buckley LJ treated it as a matter of fact.

Encik Cecil Abraham urged me to reject the questions and dismiss the appeal. With respect, I prefer to take the approach taken by Diplock J (as he then was) in *Terrar* v *Minister of Pensions and National Insurance* [2] (unreported but referred to at p 281 of Lord Widgery's judgment in *Global Plant* [1] thus):

But Diplock J in *Terrar* v *Minister of Pensions and National Insurance* (unreported, 13 July 1960) goes very much further. Dealing with the same problem, when speaking of a determination made by the Minister in that case, he said:

'In order to set aside that determination, limited as I am to setting aside determinations which are erroneous in law, Mr Turner-Samuels must satisfy me either that there was no evidence upon which the Minister could reach the decision that he did that the appellant was an independent contractor – and I do not think Mr Turner-Samuels contends that there was no evidence of that; if he does so contend, I certainly do not accept that contention – or, alternatively, it seems to me that he must fall back upon the principle which is applied from time to time by the appellate courts when they dislike the opinion of the tribunal of fact. That is set out perhaps most clearly in *Edwards* v *Bairstow* [1956] AC 14. Either one can reach the same result by talking about primary facts and secondary facts – and by that I mean inferences from primary facts – on which the appellate court is entitled to intervene, or else one can do it rather more simply, as appears in Lord Radcliffe's speech where he said, at p 36: 'If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal ....'

Lord Widgery went on to state that in his judgment that was the proper approach for him to take in *Global Plant*.[1] What he did was to first of all examine the decision appealed against to see whether it contained any false proposition of law ex facie. Next, he considers whether the decision reached was supported by no evidence (in which event of course the decision would be wrong in law). Finally, he considered whether the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the decisions arrived at.

It is not, as I see it (said Lord Widgery at p 282), for me to balance again the arguments pro and con the decision which the minister has reached, giving the separate factors the weight which I think they should or should not have. That balancing operation is a matter for the minister. All that I have to ask myself is whether the conclusion which he has reached is one that no person acting judicially and properly instructed as to the relevant law could have come to in this determination.

Applying those tests to the instant case, it is my judgment that the chairman's award is not open to attack in any one of the above grounds. The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *P Kuppusamy & Co*; *Shearn Delamore & Co.*

Reported by *Ng Sheau Jiuan*

Malaysia Building Society Bhd v Lim Kheng Kim & Ors

HIGH COURT (PENANG) – CIVIL SUIT NO 23-30-86
EDGAR JOSEPH JR J
8 JULY 1988

Civil Procedure – Judgment in default of appearance – Setting aside – Principles applicable – Laches – Bona fides – Interest on judgment debts – Independent covenant to pay interest – Doctrine of merger – Value of land – Reliance on common and public knowledge by court – Rules of the High Court 1980, O 42 r 12

Contract – Guarantee – Surety liable as principal debtor as well – Notice of demand – Service – Indulgence given to principal debtor – Security in the form of land available – Whether action against surety premature – Misrepresentation – Whether guarantee void

The first defendant along with the other defendants had signed a joint and several guarantee in favour of the plaintiff in consideration of the plaintiff granting a loan to an incorporated company ('the borrower'). The loan was secured by a charge over the borrower's land. Eventually, the plaintiff commenced legal proceedings against the defendants in their capacity as sureties for the recovery of the debt. Although served with the writ of summons and statement of claim, the first defendant did not enter an appearance and so, on 18 March 1986, the plaintiff obtained judgment in default of appearance against him. On 7 November 1986, the first defendant was personally served with a bankruptcy notice and a copy of the default judgment. On 23